AFFIRMED and Opinion Filed July 15, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01374-CR
No. 05-19-01375-CR
No. 05-19-01376-CR

DEVAUGHAN JACLAY ROBERTS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 5
Dallas County, Texas
Trial Court Cause Nos. F16-14021-L, F16-14022-L & F17-30173-L

MEMORANDUM OPINION

Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Osborne

On March 5, 2018, Appellant, Devaughan Jaclay Roberts, entered pleas of guilty to three charges of aggravated robbery. In keeping with a plea bargain agreement between appellant and the State, the trial court placed appellant on ten years' deferred adjudicated community service.[1]

[1] Appellant was also ordered to pay restitution in the amounts of $900.00 in Cause No. F16-14021-L and $500.00 in Cause No. F16-14022-L.

The State thereafter filed motions to proceed to an adjudication of guilt in all three cases. Appellant entered pleas of not true to these allegations. After a hearing, the trial court adjudicated appellant's guilt and sentenced him to fifteen years' imprisonment.

On appeal, appellant claims that (1) the trial court abused its discretion when it found that he violated the terms of his community supervision because there was insufficient evidence to support that finding and (2) the trial court erred in overruling his objection to the State's closing argument at the punishment phase of the trial during which the prosecutor referred to "facts that were not presented in evidence," documents that were not the proper subject of judicial notice, and extraneous offenses. The State responds that the evidence was sufficient to revoke appellant's community supervision. The State further responds that appellant did not preserve his complaint about the State's closing argument, the argument was supported by the record, and appellant cannot show harm from that argument. We agree with the State and affirm.

Background

At the hearing on the motion to adjudicate guilt, the State presented the testimony of Jared Clemmer who testified that on June 9, 2018, he was robbed at gunpoint by appellant. Clemmer identified appellant as his assailant in open court.

Clemmer had returned to his apartment complex late at night; he was walking down the hallway to his apartment when he heard a noise he described as "full boom,

like sprinting, like running." He turned around to discover appellant pointing a silver gun at his chest.

Appellant told Clemmer not to move. He then approached Clemmer and demanded his keys and wallet. Appellant told Clemmer to walk back out to the parking lot where Clemmer had just parked his vehicle. When they got to the parking lot, appellant told Clemmer to leave. As Clemmer complied, he heard his vehicle "start up and drive off."

Clemmer called 911. Because he could not access his apartment, he hid in a big bush behind the building until the police arrived. He gave the police the following description of his assailant: an African-American male, "about 5' 5", 5' 6", 150 pounds and close to my age: 19, 20 years old."

Two days later, Clemmer was notified that his car had been found. He was also asked to go to the police station where he was shown a photographic lineup. Clemmer identified appellant's photograph and stated he was seventy-five to eighty percent sure that appellant was his assailant. The investigating Dallas Police detective, Samuel Butler Jr., confirmed that Clemmer had identified appellant's photograph during the lineup and also that Clemmer had stated he was seventy-five

to eighty percent sure about his identification. Clemmer testified that there was nothing suggestive or coercive about the lineup.[2]

Clemmer's car, which was returned to him, was damaged[3] and smelled of "[c]igarette smoke and weed smoke." Clemmer did not smoke.

On June 11, 2018, Dallas Police Officer Joshua Maldonado received a report from a deployment officer at an apartment complex that a stolen vehicle had been spotted. That officer watched the vehicle until a person approached the vehicle and drove away. At a gas station, Maldonado saw this same vehicle and observed appellant exit the vehicle from the driver's side. After appellant was arrested, the vehicle's key fob was discovered in his pocket. Appellant told Maldonado "his brother lent him the car."

Maldonado testified that he did not investigate appellant's claim of his brother loaning him the car; instead he contacted a detective. Butler, the investigating detective on the case, also testified that he did not discover the identity of appellant's "brother" or investigate that claim. He was of the opinion that he had enough evidence to bring charges against appellant based on the description Clemmer gave on the night of the offense, Clemmer's subsequent identification of appellant from the photographic lineup, and the fact that appellant was located in the stolen vehicle.

[2] A video of the photographic lineup was shown to the trial court. Butler also testified that while he created the photographic lineup he did not administer it to Clemmer.

[3] Clemmer testified that the "back left rim had just been curb-checked pretty bad" and a "lot of paint was scratched off of that."

Sufficiency of Evidence

Appellant claims the trial court abused its discretion by finding that he had committed a new offense. Appellant relies on the statement Clemmer made at the time he was shown the photographic lineup, *i.e.*, that he was seventy-five to eighty percent sure of this identification, and on the failure of the police to investigate appellant's claim that his brother had loaned him the car.

An original motion to proceed with an adjudication of guilt was filed on June 29, 2018. An amended motion was filed on April 3, 2019. The motions alleged multiple violations of the terms and conditions of appellant's community supervision. However, during the hearing, the State abandoned all allegations except the allegation that appellant violated condition (a) by committing a new offense of aggravated robbery.

Condition (a) of appellant's community supervision required that appellant "commit no offense against the laws of this or any other State, or the United States, and . . . not possess a firearm during the term of supervision." The State's amended motion to proceed to an adjudication of guilt alleged that appellant violated condition (a) twice by committing "the offense of Aggravated Robbery as alleged in Cause Number F18-54894L" and by committing "the offense of Possession of Marijuana as alleged in Cause Number MB18-71290." The State concedes in its brief to this Court that the trial court could not have found appellant possessed marijuana because the illegal substance alleged in MB18-71290 was not marijuana. Hence, the

resolution of appellant's issue is wholly dependent on whether the State sufficiently proved that appellant committed a new offense of aggravated robbery.

On a motion to proceed with an adjudication of guilt, the State has the burden to prove a violation of a condition of community supervision by a preponderance of the evidence. *Hacker v. State*, 389 S.W.3d 860, 864-65 (Tex. Crim. App. 2013). A "preponderance of the evidence" means the greater weight of the credible evidence creates a reasonable belief that the defendant has violated a condition of community supervision. *Id.* at 865; *Dansby v. Stat*e, 468 S.W.3d 225, 231 (Tex. App.—Dallas 2015, no pet.). If more than a scintilla of the evidence presented creates a reasonable belief that the defendant violated a condition of his supervision, the evidence is sufficient to revoke his probation. *Hacker*, 389 S.W.3d at 865. We review a trial court's decision to proceed with an adjudication of guilt for an abuse of discretion. *Hacker*, 389 S.W.3d at 865; *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006). Because the trial judge is the sole judge of the witnesses' credibility and the weight to give the evidence, in determining whether the trial court abused its discretion we review the evidence in the light most favorable to the order. *Hacker*, 389 S.W.3d at 865.

As detailed above, Clemmer identified appellant as the robber who pointed a gun at his chest and stole his vehicle. While Clemmer was seventy-five to eighty percent sure of his identification of appellant as his assailant at the time he was shown the photo line-up, his in-court identification of appellant at trial was

unequivocal. Detective Butler confirmed that Clemmer identified appellant from that procedure. Further, there was no evidence that the line-up was impermissibly suggestive. Additionally, Maldonado testified that appellant was arrested after being observed driving Clemmer's vehicle and appellant had that vehicle's key fob in his pocket at the time of the arrest.

Viewing this evidence in the light most favorable to the trial court's finding, we conclude the trial court did not abuse its discretion by finding that appellant had violated the condition of his probation which dictated that he not commit any new offenses. We overrule appellant's first issue.

Prosecutor's Argument

At the beginning of the punishment phase of the adjudication proceeding, the prosecutor asked the trial court to take judicial notice of the court's file and the trial court judge seemingly agreed:

> [BY THE PROSECUTOR]: State would ask the Court to take judicial notice of the contents of the Court's file. . . .
>
> THE COURT: All right. Let's proceed.

At the conclusion of the evidence, the State made the following argument in an apparent reference to that file:

> [BY THE PROSECUTOR]: Judge, at this time, as you have heard, the Defendant was on probation for three aggravate (sic) robberies; one in which he picked up 6-23 of 2016, when he was 17. That case had two victims . . . He committed that crime with a gun. He held those two boys up, that went to his high school. They pointed him out from a yearbook. He then picked up another case, another

> aggravated robbery, with his two friends at a Verizon store January of 2017, only six months later. At that point, he had five victims. There were five different individuals in that store . . .
>
> [BY DEFENSE COUNSEL]: Your Honor, I'm going to object to arguing facts that were not presented in evidence.
>
> [BY THE PROSECUTOR]: They're in the judicial notice of the file, Judge. All that information –
>
> THE COURT: Overruled. Proceed.

Preservation

The State argues that appellant has failed to preserve any error with respect to the prosecutor's argument and we agree that most of appellant's complaints are not preserved.

First, appellant voiced no objection to the State's request that the trial court take judicial notice of the court file. As a result, if the trial court took judicial notice of the file, nothing is preserved for our review with respect to that action. *Nguyen v. State*, 982 S.W.2d 945, 948 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

Second, the objection at the hearing does not comport to his complaints on appeal. Appellant's precise objection at trial was that the State was arguing facts not in evidence. On appeal, however, appellant claims not only that the prosecutor erred in referring to evidence not before the trial court but also that the trial court erred "if it took judicial notice of the contents of the court's file." As noted above, appellant cannot complain at this time that judicial notice was improper. *Id*. Further, in order to preserve an issue for appellate review, an objection raised at trial and presented

to the trial court for a ruling must comport to the issue raised on appeal. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002); *see also Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014) (stating "[w]e are not hyper-technical in examination of whether error was preserved, but the point of error on appeal must comport with the objection made at trial"). An appellate court may not reverse the trial court's decision on a legal theory not presented to the trial court by the complaining party. *Hailey v. State*, 87 S.W.3d 118, 121-122 (Tex. Crim. App. 2002). Here, appellant did not object to the propriety of the judicial notice or to the prosecutor referring, if she did, to extraneous offenses. As a result, appellant's argument is not preserved.

Third, after the trial court overruled appellant's objection, the prosecutor's argument continued:

> [BY THE PROSECUTOR]: There was another set of victims that he had, based on having a gun, going into a store with a ski mask and making these people get on the ground and putting their face to the ground, while they walked around with guns. That was when he was 18 years old.
>
> He said he was going to flip on his counterparts, his two co-defendants. So I, myself, put this . . . (defendant) . . . on probation,[4] because I made an assumption that maybe he could turn his life around. I did give him a chance, and he got deferred.

[4] The prosecutor's choice of language is poor. It was the trial court that sentenced appellant to probation, notwithstanding any plea offer the prosecutor may have made.

> [BY DEFENSE COUNSEL]: Your Honor, I'm going to object to the prosecutor turning and facing the family, as she's saying this and pointing at them.
>
> THE COURT: She's not pointing. This is argument. Overruled.
>
> [BY THE PROSECUTOR]: I gave this young man an opportunity to change his life. I gave him deferred probation.[5] But, only two and-a-half months later, he picked up another aggravated robbery, where he did this one solely alone. He pulled a gun and pointed it at an individual – another young man not much older than him – committing an aggravated robbery again, where he stole his vehicle. He was found a few days later in that car, with the key in his pocket, by officers.

Counsel for appellant's only objection was that the prosecutor was "pointing" at family members. He did not reiterate any objection on the basis that the prosecutor was arguing facts outside the record, referring to documents that were not the proper subject of judicial notice, or bringing in improper extraneous offenses. Generally, where the "same objected-to argument is presented elsewhere during trial without objection, no reversible error exists." *Moyer v. State*, 948 S.W.2d 525, 531 (Tex. App.—Fort Worth 1997, pet. ref'd); *see also Barnes v. State*, 70 S.W.3d 294, 307 (Tex. App.—Fort Worth 2002, pet. ref'd) (holding that a contemporaneous objection must be made each time the objectionable jury argument is made in order to preserve error). Because defense counsel made no further objections to similar arguments made by the prosecutor, any error in the prosecutor's argument is not preserved. *See* TEX. R. APP. P. 33.1(a); *see also Barnes*, 70 S.W.3d at 307; *Moyer*, 948 S.W.2d at 531.

[5] *See* footnote 4, *supra*.

No Reversible Error

Even if appellant preserved this error for our review, we would not find reversible error. The substance of the prosecutor's statements were either in evidence or reasonably inferred from the evidence before the court.

The record shows that the trial court's files included a judicial confession in each of the underlying cases which referenced the use of a firearm. These confessions also referred to dates and the names of victims. The trial court's files also included the indictments in each case which identified appellant's birthday as November 13, 1988; any reference to appellant's age was properly inferred from those documents.

The remaining statements regarding going to the same high school as some of the victims and the Verizon store were introduced into evidence during the testimony of appellant's mother, both at the guilt-innocence phase of the trial and at the punishment phase:

> Q. [BY THE PROSECUTOR]: Okay. And you know that your son has already been on three aggravated robberies, similar circumstances. Him and his friends went to a Verizon with a gun and robbed the store.
>
> You're clear that's what he's on for?
>
> A. I'm very aware, yes.
>
> *

Q. At 20 years old, as an adult man, you realize he has had seven victims where he pulled a gun on seven people, since he was 17 years old? Do you realize that?

Because, at the Verizon store, there were several people there. Five people there. A mother and son were there, and they were frightened for their life. They thought they were going to die.

You understand that?

A. Yes.

Q. And that he also did another aggravated robbery when he was in high school, against two boys who went to his high school, who knew exactly who he was, who went to school with him. He pulled a gun on those people, too. Do you realize that?

A. A pellet gun. Yes.

*

[BY THE WITNESS]: The second incident with the Verizon, they had got out of school. The young mans [sic.] told him that they needed to go pay their phone bill. He was with them at the time, as they was holding up the store.

As I read the police report, it stated that there was two individuals that was inside of the store holding up the manager in the vault or the safe and the people in the front counter with a child. The third victim, which was my son, walked in so many minutes later, stood there, as one of the young mans [sic.] with the gun was hollering, "Grab the bag. Grab the bag."

Devaughan is, like, in a state, like, what was going on? After the young man kept hollering "grab the bag, grab the bag" he grabbed the bag and took off running in the store.

Because the complained of evidence was before the trial court through witness testimony, the trial court was within its discretion to overrule appellant's objection to the prosecutor's argument.

No Harm

Even if we were to find that the prosecutor's argument was erroneous, we fail to see how appellant has been harmed. This argument was made to the trial court, not to a jury. The trial court was already well aware that appellant pled guilty and judicially confessed to three aggravated robberies involving a firearm. In considering the State's motion to proceed to an adjudication of guilt, the trial court had already found that appellant violated the terms of his probation by committing a new aggravated robbery involving a firearm. The trial court was aware of the facts of all offenses.

Because this alleged improper argument occurred after the trial court adjudicated appellant's guilt, we consider the prejudicial effect on the severity of the punishment assessed. *See Coleman v. State*, 577 S.W.3d 623, 639, 641 (Tex. App.—Fort Worth 2019, no pet.) (holding that when harmful improper argument is made at the punishment phase, the appropriate relief is to reverse the punishment assessed and remand for a new punishment hearing).

Here, the adjudication and sentencing occurred in two separate hearings. The trial court had before it appellant's judicial confessions, appellant's mitigating evidence, and the information adduced at the adjudication phase. The trial court

assessed appellant's punishment at fifteen years' imprisonment in each case and ordered that those sentences were to run concurrently. This was at the lower range of the permissible punishment for appellant's offenses, all of which are first-degree felonies. TEX. PENAL CODE ANN. § 12.32 (providing that the punishment range for a first-degree felony is confinement for five to ninety-nine years or life imprisonment). Because these sentences are within the statutory range of punishment they cannot be considered excessive. *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984); *Foster v. State*, 525 S.W.3d 898, 911 (Tex. App.—Dallas 2017, pet. ref'd). We conclude that appellant has not shown how he was harmed by the State's argument. We overrule appellant's second issue.

Conclusion

The trial court's judgments are affirmed.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DEVAUGHAN JACLAY ROBERTS, Appellant	On Appeal from the Criminal District Court No. 5, Dallas County, Texas Trial Court Cause No. F-1614021-L.
No. 05-19-01374-CR V.	Opinion delivered by Justice Osborne. Justices Whitehill and Carlyle participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered July 15, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DEVAUGHAN JACLAY ROBERTS, Appellant	On Appeal from the Criminal District Court No. 5, Dallas County, Texas Trial Court Cause No. F-1614022-L.
No. 05-19-01375-CR V.	Opinion delivered by Justice Osborne. Justices Whitehill and
THE STATE OF TEXAS, Appellee	Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered July 15, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DEVAUGHAN JACLAY ROBERTS, Appellant	On Appeal from the Criminal District Court No. 5, Dallas County, Texas Trial Court Cause No. F17-30173-L.
No. 05-19-01376-CR V.	Opinion delivered by Justice Osborne. Justices Whitehill and
THE STATE OF TEXAS, Appellee	Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered July 15, 2020